UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

REGINA BEAMON, Case No. 01-11162
Debtor.

REGINA BEAMON,
Plaintiff,
-against- Adversary No. 01-90256

LITTON LOAN SERVICING, LP,
Defendant.

APPEARANCES:

ROBERT J. ROCK, ESQ.
Attorney for Plaintiff
60 South Swan St
Albany, NY 12210

CARUS & MANNIELLO, P.C. Jeffrey N. Zipser, Esq.
Attorneys for Defendant
115 Eileen Way Suite 103
POB 9021
Syosset, NY 11791-9021

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is whether a certain mortgage granted to Litton Loan Servicing, LP ("Litton") by Regina Beamon ("Debtor") against her two-family residence located at 968 Main Avenue, Schenectady, New York (the "Premises") is subject to modification.

JURISDICTION

The court has jurisdiction over this core matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(B), (K), and 1334(b).

BACKGROUND/FACTS

The Debtor filed a voluntary petition under Chapter 13 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 -1330,[1] on March 2, 2001. On August 17, 2001, the Debtor filed the underlying adversary complaint seeking to "strip down" Litton's mortgage lien against the Premises. Specifically, the Debtor sought to bifurcate Litton's lien on the Premises to reflect the fair market value of the Premises with the balance of the debt becoming unsecured. Litton moved to dismiss the proceeding. By Memorandum-Decision and Order issued October 18, 2002 (No. 17),[2] the court granted summary judgment for the Debtor adopting the reasoning of *Lomas Mortgage, Inc. v. Louis*, 82 F. 3d 1 (1st Cir. 1996) (antimodification provision of § 1322(b)(2) does not bar modification of mortgage against multi-unit property in which one unit is debtor's principal residence and security interest extends to other income producing units). *Beamon v. Litton Loan Servicing, LP* (*In re Beamon*), Ch.13 Case No. 01-11162, Adv. No. 01-90256, slip op. (Bankr. N.D.N.Y. October 18, 2002). On appeal, the District Court reversed and remanded for further proceedings consistent with the holding of *In re Brunson*, 201 B.R. 351 (Bankr. W.D.N.Y. 1996) (in determining whether the antimodification provisions of §1322(b)(2) apply to multi-dwelling building where debtor resides in one unit, the court must examine whether predominant intention behind purchase was home ownership versus investment income or business opportunity). *Litton Loan Servicing, L.P. v. Beamon*, 298 B.R. 508 (N.D.N.Y.

[1]Unless otherwise noted, all statutory references are to Title 11 of the United States Code, prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[2]Unless otherwise indicated, all docket references relate to the above-captioned adversary proceeding.

2003).[3]

A trial was conducted before the court on March 15, 2005. The Debtor testified on her own behalf, and Thomas Tokos, the originating loan officer, testified on behalf of Litton. From the parties' pleadings, including the Joint Stipulation of Facts (the "Stipulation") (Defendant's Ex. A), Pretrial Statements, Exhibits, and trial testimony, the court makes the following findings of fact pursuant to Federal Rule of Civil Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

1. By way of a valid assignment, Litton is the holder of a note dated August 15, 1995, in the original principal amount of $63,150 (the "Note"), secured by a mortgage against the Premises (the "Mortgage") executed the same date. (Stipulation ¶ 2.)

2. The Premises consisted of a two-family dwelling at the time of the execution of the Note and Mortgage and, except for gaps between tenancies, the Debtor has rented one of the units and has resided in the other. (*Id*. ¶¶ 10, 11.)

3. From February 11, 1999 to the present, the Debtor has operated a licensed day care center in her residential unit. (*Id.* ¶ 12.)

4. Litton was unaware of, and the Plaintiff's loan application did not evidence, any commercial use of the Premises. (*Id.* ¶ 14.)

5. The form of the Mortgage is a "New York-Single Family-Fannie Mae/Freddie Mac Uniform Instrument" with a "1 - 4 Family Rider (Assignment of Rents)" attached. (*Id.* ¶ 15.)

6. The Debtor does not own, nor has she ever owned, any other real property or income producing property. (*Id.* ¶ 16.)

7. The Debtor's loan application and the issuance of the Note and Mortgage were approved by the original lender through its residential loan department. (*Id.* ¶ 17.)

8. The Debtor's loan application indicates the purpose of the loan was for the purchase of a primary residence. (*Id.* ¶ 18.)

9. The interest rate applied to the Debtor's mortgage was a residential loan rate. (*Id.* ¶

[3] Familiarity with the decisions of the Bankruptcy and District Courts is presumed.

19.)

10. The Premises are suitable for a two-family residence and home occupation only. (*Id.* ¶ 20.)

11. The Debtor executed an affidavit at the time of the loan closing attesting that she would in good faith occupy the Premises as her principal residence. (*Id.* ¶ 22.)

12. The fair market value of the Premises is $43,500. (*Id.* ¶ 24.)

13. Litton filed a proof of claim on May 7, 2001 indicating that the balance owed on the Mortgage as of the filing date of the Petition was $85,484.11. (*Id.* ¶ 6.)

14. Litton is undersecured. (*Id.* ¶ 25.)

15. In the "Declarations" portion of the Debtor's loan application, the Debtor agreed to occupy the Premises as her primary residence. (*Id.* ¶ 23.)

At trial, the Debtor's counsel asked her a series of questions regarding her predominant purpose in purchasing the Premises:

Q: And, in purchasing this property, and in taking this loan, was it your principle purpose to have a residence?

A: I had two goals in mind for the house, to live in and to rent out. I wanted to use it for both, living and –

Q: So, is it your testimony that you had two goals, of equal purpose, to have a residence and to have income?

A: Yes.

Q: And neither one was your principle motive in obtaining the property?

A: No.

Q: Or on getting the loan?

A: No.

(3/15/05 Tr. at 12 - 13.)

At the conclusion of the evidentiary hearing, the parties were given time to submit post-

trial memoranda of law. The matter was then taken under advisement.

ARGUMENTS

The Debtor argues that her burden was simply "to establish that the predominant interest of the parties at the time the loan was made was *not* for her to obtain a primary residence." (Debtor's Post Trial Mem. (No. 50) at 3.) The Debtor states further that "having established that she did not have one predominant intention in entering into the loan, the burden shifted to the Bank to establish that there was a predominant intention of the parties and that was to enter into a residential loan agreement that would enable Regina Beamon to obtain a primary residence." *Id.* The Debtor posits that Litton failed to accomplish this and concludes that "[i]f the *Brunson* test is to be used, it should be construed to require that the testimony establish the existence of a predominant intention but lacking such an intention, the *Lomas* test should be applied." *Id*. at 4.

Litton argues that whether or not the Debtor intended to purchase a duplex is not relevant. Rather, what is crucial under *Brunson* is whether home ownership or investment income or a business opportunity was the predominant purpose of the transaction. Litton concludes that the Debtor, in testifying that she had no predominant intention, simply failed to meet her burden of proof. Furthermore, even if the burden shifted,

> [A]ll the documentation before this Court and executed by the plaintiff, including the [Stipulation], the loan application, the underwriting summary, the note and mortgage, indicate that the intention of this loan was home ownership. Nothing in Debtor's testimony disputes that. That the parties intended rental income from a second unit does not catapult the transaction into a commercial transaction.
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> . . . .
>
> The fact that one of the two residential units at the premises was expected to generate income and was considered in the underwriting of the loan is further evidence that the <u>rental income</u> was seen as necessary for home ownership.

(Def.'s Post Trial Mem. (No. 52) at 4.)

DISCUSSION

Section 506(a) allows a debtor to bifurcate a creditor's secured claim to the value of the creditor's underlying collateral.[4] The balance of the creditor's claim would then be treated as unsecured. *Id*. Section 1322(b)(2), however, provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

In deciding whether the antimodification provision of § 1322(b)(2) is applicable to Litton's mortgage, the District Court concluded that the applicable standard to be applied is that articulated in *Brunson*. *Litton Loan Servicing, L.P. v. Beamon*, 298 B.R. 508. Judge Kaplan directed in *Brunson* that whether a mortgage against a debtor's principal residence is subject to modification is to be determined on a case-by-case basis rather than by a bright line approach. *Brunson*, 201 B.R. at 353. *Brunson* offers a list of factors to be considered in making this determination:

> [W]hether the Debtor (to the lender's knowledge) owned other income producing properties or other properties in which she could choose to reside; whether she had a principal occupation other than as landlord, and the extent to which rental income or other business income produced from the real estate contributed to her income; whether her total income was particularly high or particularly low; whether the mortgage was handled through the commercial loan department or the residential mortgage loan department of the lender; whether the interest rates applied to the mortgage were home loan rates or commercial loan rates; the demographics of the market (e.g. are "doubles" a much more affordable "starter home" than a single, in that locale); and the extent to

[4]11 U.S.C. § 506(a) provides:
An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent to the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

> which, and purpose for which, potential business uses of the land (such as farming) were considered by the lender. There surely may be others.

Id. Pursuant to *Brunson*, the focus of the court's inquiry is the mind set or intent of the parties at the time they entered into the mortgage agreement.

The court agrees with the Debtor in part in that this case, as is true in many instances, is all about the burden of proof. The court, however, disagrees with the Debtor's conclusion that she carried her burden, and it thus shifted to Litton. The Debtor argues that her burden was a negative one - only to establish that the parties did not primarily intend the transaction to be residential in character. However, under the *Brunson* mandate, the Debtor carries the affirmative duty of convincing this court that the transaction in question was viewed by the parties as *predominantly* a commercial loan transaction. *Brunson,* 201 B.R. at 354 (emphasis added). Anything less than that would, in Judge Kaplan's analysis, place this obligation within the safe harbor of § 1322 (b)(2) and prohibit modification. The Debtor has simply failed to meet her burden. Even if Litton, or its predecessor, knew or should have known that its loan was secured by a multi-family dwelling, that fact in and of itself is not decisive under *Brunson*. What is significant is that no evidence was produced by the Debtor that the transaction at issue was predominantly commercial or income driven.

To the contrary, it was established that the Debtor intended to use the Premises as her principal residence when she signed the Mortgage and has and still does reside at the Premises. The Debtor did not own more than one property or any other income producing property when she obtained the loan. The Mortgage is a "New York-Single Family-Fannie Mae/Freddie Mac Uniform Instrument," with a "1 - 4 Family Rider (Assignment of Rents)" attached. These are standard forms used for residential loans. The loan's rate is a residential rate, and the loan was

processed by the residential loan department. Under *Brunson*, the fact that the Premises have a second unit does not in and of itself remove the antimodification protection afforded by § 1322(b)(2) to Litton's secured claim. Most telling, as pointed out by Litton, the Debtor testified that she had no predominant intention; she wanted both a home and income. Additionally, none of the testimony of Litton's witness, Mr. Tokos, even hints at a commercial transaction, predominant or otherwise. In applying the standard articulated in Brunson, as directed by the District Court, and looking at the totality of the factors enumerated in *Brunson*, the court concludes the Mortgage was for residential, not commercial, purposes.

CONCLUSION

Because the Debtor has failed to convince the court that the transaction at issue was predominantly commercial in nature, Litton's secured claim is subject to the protections of the antimodification provision of § 1322(b) and cannot be bifurcated pursuant to § 506(a).

Accordingly, it is hereby

ORDERED, that the Complaint is denied, and the instant adversary proceeding is dismissed.

Dated: February 10, 2006
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge